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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 SYLVESTER SANFORD TATUM,

Case No. 2:14-cv-01280-JCM-GWF

10 Petitioner,

ORDER

11 v.

12 D.W. NEVEN, et al.,

13 Respondents.

14 This *pro se* 28 U.S.C. § 2254 habeas petition filed by Sylvester Sanford Tatum
15 comes before the court for disposition on the merits (ECF No. 7).

16 **I. Procedural History and Background**

17 As this court has previously set forth in the order granting in part the motion to
18 dismiss, on October 28, 2010, a jury convicted Tatum of one count of trafficking in a
19 controlled substance and one count of possession of a controlled substance (exhibit 46
20 to respondents' motion to dismiss, ECF No. 10).¹ The state district court sentenced
21 Tatum to ten to twenty-five years for the trafficking count and twelve to thirty-two months
22 for the possession count, to run concurrently. *Id.* Judgment of conviction was filed on
23 November 1, 2010. *Id.*²

24 The Nevada Supreme Court affirmed the convictions on October 5, 2011, and
25 remittitur issued on November 1, 2011. Exhs. 65, 67, 68. The Nevada Supreme Court
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27 ¹ Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 10, and are found
at ECF Nos. 11-17.

28 ² An amended judgment of conviction entered on August 15, 2012, corrected a clerical error to reflect that
Tatum was convicted pursuant to a jury trial and not a guilty plea. Exh. 83.

1 affirmed the state district court's denial of Tatum's first state postconviction petition on
2 June 12, 2014, and remittitur issued on July 9, 2014. Exhs. 77, 108, 124, 135, 136.
3 The state district court denied Tatum's second postconviction petition, and the Nevada
4 Court of Appeals affirmed the denial on February 24, 2015. Exhs. 132, 147, 160.

5 Tatum failed to indicate the date he dispatched his federal petition for mailing, but he
6 signed the petition on July 31, 2014 (ECF No. 7). Respondents now answer the
7 remaining claim, ground 2(B) (ECF No. 33). Tatum did not file a reply.

8 **II. Legal Standards & Analysis**

9 **a. AEDPA Standard of Review**

10 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty
11 Act (AEDPA), provides the legal standards for this court's consideration of the petition in
12 this case:

13 An application for a writ of habeas corpus on behalf of a person in
14 custody pursuant to the judgment of a State court shall not be granted with
15 respect to any claim that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim —

16 (1) resulted in a decision that was contrary to, or involved an
17 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

18 (2) resulted in a decision that was based on an unreasonable
19 determination of the facts in light of the evidence presented in the State
court proceeding.

20 The AEDPA "modified a federal habeas court's role in reviewing state prisoner
21 applications in order to prevent federal habeas 'retrials' and to ensure that state-court
22 convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S.
23 685, 693-694 (2002). This court's ability to grant a writ is limited to cases where "there is
24 no possibility fair-minded jurists could disagree that the state court's decision conflicts
25 with [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The
26 Supreme Court has emphasized "that even a strong case for relief does not mean the
27 state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538
28 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing

1 the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating
2 state-court rulings, which demands that state-court decisions be given the benefit of the
3 doubt”) (internal quotation marks and citations omitted).

4 A state court decision is contrary to clearly established Supreme Court precedent,
5 within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts
6 the governing law set forth in [the Supreme Court’s] cases” or “if the state court
7 confronts a set of facts that are materially indistinguishable from a decision of [the
8 Supreme Court] and nevertheless arrives at a result different from [the Supreme
9 Court’s] precedent.” *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362,
10 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

11 A state court decision is an unreasonable application of clearly established Supreme
12 Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies
13 the correct governing legal principle from [the Supreme Court’s] decisions but
14 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538
15 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause
16 requires the state court decision to be more than incorrect or erroneous; the state
17 court’s application of clearly established law must be objectively unreasonable. *Id.*
18 (quoting *Williams*, 529 U.S. at 409).

19 To the extent that the state court’s factual findings are challenged, the
20 “unreasonable determination of fact” clause of § 2254(d)(2) controls on federal habeas
21 review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause
22 requires that the federal courts “must be particularly deferential” to state court factual
23 determinations. *Id.* The governing standard is not satisfied by a showing merely that the
24 state court finding was “clearly erroneous.” 393 F.3d at 973. Rather, AEDPA requires
25 substantially more deference:

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27 [I]n concluding that a state-court finding is unsupported by
28 substantial evidence in the state-court record, it is not enough that we
would reverse in similar circumstances if this were an appeal from a
district court decision. Rather, we must be convinced that an appellate

1 panel, applying the normal standards of appellate review, could not
2 reasonably conclude that the finding is supported by the record.

3 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.2004); see also *Lambert*, 393
4 F.3d at 972.

5 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be
6 correct unless rebutted by clear and convincing evidence. The petitioner bears the
7 burden of proving by a preponderance of the evidence that he is entitled to habeas
8 relief. *Cullen*, 563 U.S. at 181.

9 **b. Ineffective Assistance of Counsel**

10 Ineffective assistance of counsel (IAC) claims are governed by the two-part test
11 announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the
12 Supreme Court held that a petitioner claiming ineffective assistance of counsel has the
13 burden of demonstrating that (1) the attorney made errors so serious that he or she was
14 not functioning as the “counsel” guaranteed by the Sixth Amendment, and (2) that the
15 deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing
16 *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that
17 counsel’s representation fell below an objective standard of reasonableness. *Id.* To
18 establish prejudice, the defendant must show that there is a reasonable probability that,
19 but for counsel’s unprofessional errors, the result of the proceeding would have been
20 different. *Id.* A reasonable probability is “probability sufficient to undermine confidence in
21 the outcome.” *Id.* Additionally, any review of the attorney’s performance must be “highly
22 deferential” and must adopt counsel’s perspective at the time of the challenged conduct,
23 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the
24 petitioner’s burden to overcome the presumption that counsel’s actions might be
25 considered sound trial strategy. *Id.*

1 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
2 performance of counsel resulting in prejudice, “with performance being measured
3 against an objective standard of reasonableness, . . . under prevailing professional
4 norms.” *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations
5 omitted). When the ineffective assistance of counsel claim is based on a challenge to a
6 guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate “that
7 there is a reasonable probability that, but for counsel’s errors, he would not have
8 pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52,
9 59 (1985).

11 If the state court has already rejected an ineffective assistance claim, a federal
12 habeas court may only grant relief if that decision was contrary to, or an unreasonable
13 application of, the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).
14 There is a strong presumption that counsel’s conduct falls within the wide range of
15 reasonable professional assistance. *Id.*

17 The United States Supreme Court has described federal review of a state supreme
18 court’s decision on a claim of ineffective assistance of counsel as “doubly deferential.”
19 *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).
20 The Supreme Court emphasized that: “We take a ‘highly deferential’ look at counsel’s
21 performance . . . through the ‘deferential lens of § 2254(d).” *Id.* at 1403 (internal
22 citations omitted). Moreover, federal habeas review of an ineffective assistance of
23 counsel claim is limited to the record before the state court that adjudicated the claim on
24 the merits. *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has
25 specifically reaffirmed the extensive deference owed to a state court’s decision
26 regarding claims of ineffective assistance of counsel:
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1 Establishing that a state court's application of *Strickland* was
2 unreasonable under § 2254(d) is all the more difficult. The standards
3 created by *Strickland* and § 2254(d) are both "highly deferential," *id.* at
4 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.
5 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review
6 is "doubly" so, *Knowles*, 556 U.S. at 123. The *Strickland* standard is a
7 general one, so the range of reasonable applications is substantial. 556
U.S. at 124. Federal habeas courts must guard against the danger of
equating unreasonableness under *Strickland* with unreasonableness
under § 2254(d). When § 2254(d) applies, the question is whether there is
any reasonable argument that counsel satisfied *Strickland's* deferential
standard.

8 *Harrington*, 562 U.S. at 105. "A court considering a claim of ineffective assistance of
9 counsel must apply a 'strong presumption' that counsel's representation was within the
10 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466
11 U.S. at 689). "The question is whether an attorney's representation amounted to
12 incompetence under prevailing professional norms, not whether it deviated from best
13 practices or most common custom." *Id.* (internal quotations and citations omitted).

14 **Ground 2(B)**

15 Tatum contends that his Sixth and Fourteenth Amendment rights to effective
16 assistance of counsel were violated (ECF No. 7, pp. 39-42). He asserts that trial
17 counsel failed to communicate to him a plea offer that the State extended before trial
18 and that appellate counsel failed to raise the issue on appeal.

19 In *Frye v. Missouri*, 566 U.S. 134, 147-148 (2012), the Supreme Court held that,
20 generally, defense counsel has a duty to communicate formal plea offers from the State
21 "on terms and conditions that may be favorable to the accused." To show prejudice, a
22 defendant must demonstrate a reasonable probability that he would have accepted the
23 plea had he been afforded effective assistance of counsel and that "the end result of the
24 criminal process would have been more favorable by reason of a plea to a lesser
25 charge or a sentence of less prison time" (*i.e.*, defendant must show a reasonable
26 probability that the State would not have withdrawn the offer and that the trial court
27 would not have refused to accept it). *Id.* See also *Lafler v. Cooper*, 566 U.S. 156, 164
28 (2012).

1 The state district court conducted an evidentiary hearing on the state postconviction
2 petition that was limited to this one issue. Exh. 94. Tatum's defense counsel, Kirk
3 Kennedy, testified as follows. *Id.* at 4-29. Kennedy had some conversations with the
4 district attorney, David Schubert, but he could not recall a specific, written offer for a
5 low-level trafficking deal, nor did he find one when he looked back through his file. At
6 some point during trial, he had an exchange with Schubert and Schubert mentioned
7 something like well you should have taken the 1 to 6 years that I offered. Kennedy was
8 speaking with Tatum and referenced Schubert's comment to Tatum. Tatum grew upset
9 and seemed to have been unaware of the offer; he said he would have taken the offer.
10 Kennedy did not recall clearly but there may have been an offer just before trial. He did
11 not recall relaying any offer to Tatum just before trial and stated that Tatum was "very
12 firm" about wanting to go to trial. Kennedy recalled some offers to plead to high-level
13 and mid-level drug trafficking charges and recalled that Tatum was not interested in
14 those. Kennedy could not recall an offer to plead to a low-level charge. In response to
15 questioning by the court, Kennedy testified that he had no independent recollection that
16 the State proffered a low-level trafficking plea offer. *Id.* at 21.

17 Assistant district attorney Schubert had passed away prior to the evidentiary
18 hearing. Jay Raman, the assistant district attorney who tried the case with Schubert,
19 testified as follows. *Id.* at 30-40. Raman recalled a conversation between Schubert and
20 Kennedy on the eve of trial. At that time the State offered a deal in the mid or max-level
21 given the large of amount of drugs involved. In response to the offer Kennedy said that
22 Tatum did not want any deals. Raman became involved in the case closer to trial, and
23 no low-level offer was made once he was on the case. In his view they had a very
24 strong case, including based on Tatum's calls from jail to his co-defendant telling him
25 where the drugs were in Tatum's backyard and directing him to dig them up, and the
26 subsequent police search pursuant to a warrant of the backyard, which yielded about
27 two kilos of cocaine. Raman assessed before trial that a high-level trafficking conviction
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1 was likely, and he never would have made a low-level offer in the case. A conversation
2 occurred in court, probably at calendar call, in which Schubert and Kennedy confirmed
3 that Tatum would not take a “max on mid-level” offer, which would have been six to
4 fifteen years. To Raman’s recollection, Schubert never told him that he ever made a
5 low-level offer to Tatum. Raman stated that he thought he was always present when
6 Schubert and Kennedy spoke during trial breaks, and he never remembers anyone
7 talking about a low-level trafficking deal.

8 The state district court denied the postconviction petition, finding that Kennedy and
9 Raman were credible witnesses. Exh. 108, p. 4. At the close of argument, the court
10 stated that the evidentiary hearing made it clear that no low-level offer was made. Exh.
11 101, p. 5. The court observed: “whether or not a comment – a posturing comment
12 made by a prosecutor in the heat of trial, possibly even made for mind-game playing in
13 the middle of trial, is to now suddenly be taken as there was a formal offer made that
14 was not communicated, I just don’t see that we have any evidence of that.” *Id.* In its
15 written order, the court found: “[b]ased on counsels’ testimony, it does not appear that
16 the State ever made the plea offer Defendant alleges. As the plea offer did not exist,
17 Mr. Kennedy was not ineffective for failing to convey it.” *Id.*

18 In its order affirming the denial of the state postconviction petition, the Nevada
19 Supreme Court explained:

20
21 The district court conducted an evidentiary hearing during which trial
22 counsel testified that he believed that the State offered a plea to a low-
23 level trafficking offense shortly before trial, but counsel could not
24 specifically recall the offer. Counsel did not discuss the offer with Tatum at
25 the time of the offer. An assistant district attorney testified that he did not
26 recall such an offer being made shortly before trial. Based on the
27 testimony, the district court found that the State never made the alleged
28 offer. The district court's factual findings are supported by substantial
evidence. *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994)
(affording deference to district court's factual findings that are supported
by substantial evidence). Tatum failed to meet his burden of
demonstrating that counsel received an offer from the State that he failed
to convey to Tatum. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25,
33 (2004) (requiring proponent of ineffective assistance of counsel claim

1 prove allegations by a preponderance of the evidence); see *Missouri v.*
2 *Frye*, 566 U.S. __, __, 132 S. Ct. 1399, 1409 (2012) (to demonstrate
3 ineffective assistance of counsel from failure to communicate plea offer,
4 proponent must show counsel failed to communicate offer and that client
5 would have accepted offer).

6 Exh. 135, p. 3. The Nevada Supreme Court also pointed out that the claim that
7 appellate counsel was ineffective for failing to raise this trial IAC claim lacked merit
8 because the state supreme court normally declines to consider IAC claims on direct
9 appeal. *Id.* at 2.

10 Tatum did not file a reply in support of his petition. Appellate counsel does not
11 have a constitutional obligation even to raise every nonfrivolous issue, *Jones v. Barnes*,
12 463 U.S. 745, 751 (1983), and appellate counsel certainly has no constitutional
13 obligation to raise a trial IAC claim on direct appeal to a state supreme court that
14 generally does not entertain such claims on direct appeal. With respect to Tatum's trial
15 IAC claim, he certainly has not presented anything to rebut the presumption that the
16 state court's factual determinations were correct. 28 U.S.C. § 2254(e)(1). He has not
17 demonstrated that the Nevada Supreme Court's decision was contrary to, or involved
18 an unreasonable application of, federal law established by the United States Supreme
19 Court. 28 U.S.C. § 2254(d). Accordingly, federal habeas relief as to ground 2(B) is
20 denied. The petition, therefore, is denied in its entirety.

21 **III. Certificate of Appealability**

22 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules
23 Governing Section 2254 Cases requires this court to issue or deny a certificate of
24 appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within
25 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*
26 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).
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1 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has
2 made a substantial showing of the denial of a constitutional right." With respect to
3 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists
4 would find the district court's assessment of the constitutional claims debatable or
5 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463
6 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable
7 jurists could debate (1) whether the petition states a valid claim of the denial of a
8 constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

9
10 Having reviewed its determinations and rulings in adjudicating Tatum's petition, the
11 court finds that none of those rulings meets the *Slack* standard. The court therefore
12 declines to issue a certificate of appealability for its resolution of any of Tatum's claims.
13


14 **IV. Conclusion**

15 **IT IS THEREFORE ORDERED** that the petition (ECF No. 7) is **DENIED** with
16 prejudice in its entirety.

17 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

18 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment and close this case.
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20 DATED: March 26, 2018.

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23 **JAMES C. MAHAN**
24 **UNITED STATES DISTRICT JUDGE**
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